No. 05-73

Supreme Court, U.S.
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In The

# Supreme Court of the United States

CLYDE TERRY AND ANNE TERRY,

*Petitioners,*

v.

ALAN LEVENS AND KAREN LEVENS,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Supreme Court**

## BRIEF OF RESPONDENTS ALAN AND KAREN LEVENS IN OPPOSITION

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## QUESTION PRESENTED

1. Does the unpublished decision of a California court of appeal allowing respondents to file a cross-complaint against petitioners in a California state court action violate any federal constitutional rights of petitioners?

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## INTRODUCTION

Petitioners argue that the United States Constitution entitles them to immunity from a cross-complaint when their California state law claims against respondents are re-tried in state court, after a unanimous jury verdict in respondents' favor was reversed by a California appellate court on procedural grounds. The unpublished California Court of Appeal decision in this case does not qualify for United States Supreme Court review under any of the criteria set forth in Supreme Court Rule 10. In fact, these criteria are not even mentioned at any point in the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

The trial court set this case for jury trial on an expedited basis before the complaint had been answered. The trial court also ruled that a potential cross-complaint was "severed" from the main action. The trial resulted in a unanimous verdict for defendants Alan and Karen Levens, respondents in this Court, against plaintiffs Clyde and Anne Terry, petitioners in this Court.

Subsequently, respondents filed their cross-complaint against petitioners and others. A different judge granted petitioners' motion to strike the cross-complaint on grounds that the cross-complaint was not timely, because it was filed after judgment was entered in the underlying action.

Petitioners appealed from the jury verdict against them on their complaint. Respondents appealed from the order granting the motion to strike their cross-complaint.

The court of appeal reversed the jury verdict in favor of respondents on grounds that the trial judge had forced the case to trial too quickly. In reversing that judgment, the court of appeal noted the obvious: reversal of the judgment eliminated the grounds upon which the motion to strike the cross-complaint had been granted. Therefore, the appeal of the judgment on the cross-complaint was moot. As stated by the court of appeal:

> Plaintiffs will have a fresh opportunity to try their claims. Defendants will need to file an answer and may file a cross-complaint at or before the time their answer is due. It would be wholly unjust to provide plaintiffs immunity from a cross-complaint, as that is among the burdens a plaintiff must ordinarily bear at trial.

Petitioners' Appendix at A26-27.

## REASONS FOR DENYING THE PETITION

Petitioners seek Supreme Court review based on their claim that a California court of appeal has "judicially nullified" a California state procedural statute and thus violated their rights under the Fourteenth Amendment to the United States Constitution. It is hard to say which is more far-fetched, petitioners' interpretation of the statute in question or their argument that a federal constitutional issue has been raised.

The statute in question, California Code of Civil Procedure Section 428.50(a) provides as follows: "A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint

or cross-complaint." In this case, petitioners complaint was set for trial on an expedited basis, before respondents filed an answer. In fact, the trial judge specifically relieved respondents of the responsibility of filing an answer and severed their potential cross-complaint. When the court of appeal reversed the jury verdict in respondents' favor and sent the case back down for re-trial, it noted that upon remand, respondents should file their answer to the complaint and any cross-complaint which they might have against petitioners.[1] Far from being a "judicial nullification" of California CCP Section 428.50(a), the California court of appeal decision embodies the only reasonable interpretation of that statute, under the circumstances of this case.

Moreover, petitioners' argument that "judicial nullification" of a state procedural statute by a state appellate court raises a federal constitutional issue is unprecedented. Petitioners have not cited, and respondents have not found, a single United States Supreme Court or court of appeal decision so holding.

The result which petitioners seek is that their claims against respondents should be re-tried, but that respondents should be forever barred from litigating whatever claims they may have against petitioners. Had any court made such a ruling, a much more serious issue of deprivation of constitutional rights would have arisen than is here presented by petitioners. Of course, no such ruling has been made by any court in this case, for obvious reasons.

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[1] The case has now been remanded to the trial court wherein respondents have filed both an answer and a cross-complaint.

## CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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